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No. ~~072814~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

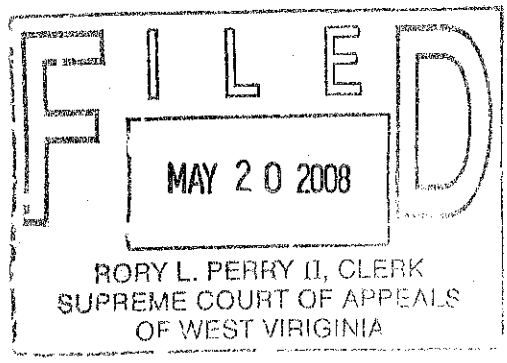
CONTRACTOR ENTERPRISE, INC.,
a West Virginia corporation,

Appellant,

v.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a West Virginia agency,

Appellee.



APPELLANT'S REPLY BRIEF

Submitted by,

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I. THE APPELLEE'S ARGUMENTS ARE DISINGENUOUS IN THAT (A) APPELLEE ASKS THIS COURT TO IGNORE THE DOCTRINE OF *STARE DECISIS* AND (B) THE APPELLEE SEEKS A DECISION WHICH WOULD BE BASED ON REASONING WHICH CONTRADICTS THE ACTUAL FACTS KNOWN TO THESE PARTIES.

The Appellee's brief asks this Court to break from, or to simply disregard, long-standing precedent because it is antiquated or to use Appellee's criticism it is not "contemporary," Brief of Appellee pp. 10-12. Further, the Appellee is well-aware that not only was the bid on the project subsequently awarded for the same amount for which it was first rejected, but also that fewer parties submitted bids the second time, see Brief of Appellee pp. 13-14 regarding Appellee's assertion that taking CEI's property would lower bids and increase the competitive bidding process. The fact is that only two (2) parties ultimately bid the project instead of the initial five (5).

CEI reiterates its reliance upon the 1889 decision of F.R.B. Cemetery Assn. v. Redd, 33 W.Va. 262, 10 S.E. 405, syl. pt. 2, Brief of Appellant p. 8. Redd remains good law and there is no indication whatsoever that it has been overruled or that its principles have even been questioned. Indeed, recent decisions and legislation represent a trend which reflects a healthy concern by citizens about the potential for government abuse of eminent domain power precisely as raised by the Court in Redd, see *e.g.* 2006 amendment to West Virginia Code , §54-1-2(11), cited in Brief of Appellee p. 11. To argue as Appellee has that the cases are inapplicable to contemporary road projects, Brief of Appellee p. 10, represents a short sited, even an arrogant view. As this Court has previously stated in an eminent domain proceeding:

> "This Court in *In Re Proposal To Incorporate Town of Chesapeake,* 130 W.Va. 527, 536, 45 S.E.2d 113, 118 (1947), spoke to the applicability of *stare decisis* in adhering to former case law even though it may be of questionable validity:
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> 'We do not mean to be understood as contending for the application fo the rule of *stare decisis* to all cases, as we are fully advised of the changes which come about requiring the overruling of cases decided under different conditions, or cases wherein, in the opinion of the Court, a plainly unsound ruling has been made. But we are of opinion that, where property or other substantial rights have been acquired on the strength of court decisions, and where to overrule such decisions would create confusion and lead to litigation . . . the doctrine should be applied.'" Signaigo v. N&W Ry. Co., 171 W.Va. 547, 301 S.E.2d 178, 181-182 (1982); see also discussion of *stare decisis* doctrine in Harshbarger v. Gainer, 184 W.Va. 656, 403 S.E.2d 399 (1991).

Predictability is at the heart of the doctrine of *stare decisis* and represents the preeminent public policy which is to be served. In the instant case as it was in Redd the petition which seeks to condemn CEI's property must not only allege that the property is needed for public use *but that it will be so devoted* if and when condemned. In this case, as condemned the property's use as a waste site was merely there as an option for the party which submitted the winning bid to accept or reject.

Both the law generally and West Virginia jurisprudence in particular reflects examples of stated antipathy toward government taking of private property under eminent domain powers, see *e.g.* discussions contained in Railroad Co. v. Iron-Works, 31 W.Va. 710, 8 S.E. 435 (1888) and O'Connor, J. dissenting in Kelo v. City of New London, 545 U.S. 469 (2005) citing the precautionary comments made by Justice Chase in Calder v. Bull, 3 Dall. 386 (1798). The law and our history encourage a conclusion that government power shall be exercised against its citizens if and only when it must be. That history should not be ignored by resorting to simplistic

arguments or shallow reasoning to the effect that time-honored statements contained in early cases are not sufficiently "contemporary" to apply.

The Appellee well knows as an actual fact that the low bid which it rejected was for $21,773,608.89. That occurred in May, 2006 before the hearings below took place and was known by the Circuit Court. The Appellee also knows that the low bid of August 21, 2007 which is subsequent to the filing of this appeal was the same *i.e.* the winning low bid was $21,773,608.89, exactly the same as the first low bid. These matters are all part of the public record as contained on line, **Contractors/Lettings/070807/070807r.htm**, as published by this very Appellee. The difference is that five (5) companies submitted bids on May 31, 2006, but only two (2) companies did so on August 21, 2007. Notwithstanding these glaring contradictory facts this Appellee makes high-minded assertions about saving public money and increasing the competitiveness of the bidding process as the grounds for condemning CEI's property, Brief of Appellee pp. 13-14. In fact, Appellee argues that the alleged lack of other adequate waste sites "was the primary cause of the lack of competition and high bids," Brief p. 13. Nothing could be further from reality.

In the end the low bid was unchanged, four (4) original bidders apparently concluded that the Appellee's "expected cost" was entirely unrealistic so they did not bid again, the project was delayed by 15 months while costs, especially fuel, rose significantly and the potential future costs of eminent domain litigation remains which includes State monies deposited with the Circuit Clerk of Logan County representing the proposed purchase price. Added to the foregoing, the Appellee has potentially alienated the very contractors upon whom it relies to build West Virginia's roads and highways by departing from industry custom and practice and producing the ironical situation that CEI's sister corporation, owned by the very same family, now uses their

personally selected waste site which they improved at significant cost but which is now titled in the State's name. When the highway project finishes, will CEI need to buy the same property a second time in order to park its heavy equipment as it is located next to Cecil Walker Machinery Co. where their equipment is repaired? It is submitted that the result which has been achieved by the Appellee's arbitrary and capricious decision to take CEI's property is absurd, reflecting just such an abuse of discretion as the Appellee argues does not exist.

2. THE SUPREMACY CLAUSE NOT ONLY APPLIES, BUT ALSO IT REQUIRES A DIFFERENT RESULT IN THIS CASE.

The Appellee argues that the Supremacy Clause has no application to this case, Brief of Appellee, p. 16. On the contrary, the Supremacy Clause of the U.S. Constitution, Article VI, always applies in every State case in which there exists a law of the United States so long as the law relates to conduct of the parties which is relevant to the action. The threshold question is whether there is such a federal law in this case. The law which CEI relies upon states that:

> "The contract provisions for one or a combination of Federal-aid projects *shall not specify a mandatory site for the disposal of surplus excavated materials unless there is a finding by the State transportation department with the concurrence of the FHWA Division Administrator that such placement is the most economical except* that the designation of a mandatory site may be permitted based on environmental considerations, provided the environment would be substantially enhanced without excessive cost." (Emphasis added).
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> Title 23 C.F.R. §635.407(g), CEI Exhibit 12.

As a constitutional principle, all West Virginia courts must conform their decisions to a federal law when that law is relevant to the facts. The foregoing regulation is directly relevant and should have been taken into account by the court below. What both the Appellee's argument and the Circuit Court's decision misses is the point, dispositive in this case, that *since the use of*

this waste site was not mandatory, [and could not be] it was not the proper subject of eminent domain proceedings. It is fundamental to taking under eminent domain power that what is taken necessarily *will be used* for a public purpose, not that it may or may not be so used. If this Court should find that there exists some ambiguity in the jurisprudence of this State so that a Circuit Court might conclude that a private party may or may not use property which has been taken under eminent domain, then that ambiguity needs to be put to rest forever. It is submitted that *the law should state that before an eminent domain proceeding to take private property can be successful there must be a showing that the property absolutely will be used for a public purpose*.

CONCLUSION AND RELIEF PRAYED FOR

The judgment below should be reversed and judgment entered in favor of CEI. The "taking" of CEI's property as proposed by the Appellee was not appropriate under the facts, indeed the taking was not even deemed to be necessary under the language found in the Appellee's own documents, *i.e.* the changed plans. According to Appellee's arguments it is not an abuse of discretion or against precedent for an agency to take private property which "might be used" by another private party if that party decides to use it, but if the private party decides not to use it, it is still a proper taking. The law will not support such an arbitrary and capricious decision as that.

In conclusion, while undersigned counsel acknowledges that both statutes and Constitutions allow the taking of private property under eminent domain authority, that authority must always be carefully exercised. Without a doubt eminent domain authority serves a useful and necessary public purpose, but when the authority is not carefully exercised, as in this case,

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CERTIFICATE OF SERVICE

The undersigned, James M. Cagle, Counsel for Appellant Contractor Enterprise, Inc., does hereby certify that a true and correct copy of the Appellant's Reply Brief was served by mailing same in a properly stamped and self-addressed envelope via the United States Mail, to Anthony G. Halkias, Esquire and Robert B. Paul, Esquire to their last-known address of West Virginia Department of Transportation, Division of Highways, 1900 Kanawha Boulevard, East, Building 5, Room A519, Charleston, West Virginia 25305-0430, on this the 20th day of May, 2008.

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